Roberts (J. D.)

REPORT OF

Chairman of the Section

ON

MEDICAL JURISPRUDENCE.

Read before N. C. Medical Society, at New Bern, May 21, 1886.

Compliments of the Author.

Reprint from the N. C. Medical Journal,
September and October, 1886.

Report of the Chairman of the Section on Medical Jurisprudence.

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(Read before the North Carolina Medical Society, at New Bern, May 21, 1886.)

Mr. President and Gentlemen of the N. C. State Medical Society:

As this is the first report to this Society from the Section of Medical Jurisprudence, I have thought it better to lay before you some general thoughts on the question, together with facts in regard to the relation of the physician to our State laws, rather than give the advances made in this special department during the past year, as it is done with the other sections.

Medical jurisprudence, or its synonymous terms, forensic medicine and legal medicine, is a broad term and covers much ground. It can properly be made to include all and every occasion or circumstance where the doctor, in his professional capacity, comes in contact with the laws of the country. Recourse has been made to the physician for help in the interpretation and solution of phenomena in his special department since the dark ages; and, as we come down through the course of time, we find him growing of more and more importance to the courts as civilization advances and chaos is reduced to order, until, within the past century, medical jurisprudence has assumed the position of a science.

Composed of two great professions, it rarely receives the amount of attention its importance merits, from the members of either, and it is for this reason that Dr. McDuffie, in his presidential address last year, urged the necessity of forming this new section in our State Society.

For want of time and space, in a paper of this character, I shall not attempt to cover, even partially, the ground occupied, and shall leave the whole matter of State medicine and public hygiene to the Board of Medical Examiners and State Board of Health, each of which has been doing such excellent work in its special department during the last few years.

Confining myself to forensic medicine in North Carolina, as I propose to do, to a great extent, the subject of malpractice suits, so much dreaded in some sections, can be dismissed with but a remark, as I do not find a single statute or Supreme Court decision bearing on the question. This I consider quite a compliment to the profession, as it shows that there is no need of such a law, or one would have been enacted.

The question of most interest to us as physicians, in relation to the law, is perhaps our prerogatives as witnesses on medical questions, and how such testimony is received. That the medical witness is placed at a disadvantage in the courts, no one acquainted with the facts will deny. He is out of his chosen element—is to testify of matters but little understood by the court and less by the jury, and, though reading and thinking in a technical manner, is expected to testify in a different vernacular. As little as our legal brother may understand what we say, it is always to the interest of one side to distort what is said, and to effect his purpose he will cross-question, badger and try in every way to confuse the witness. Knowing beforehand what it is he wishes to prove by the physician, or what facts he would like to suppress, he takes advantage of his position to shape his questions in such a manner as to gain his purpose, even at the expense of a seeming error on the part of the expert.

There is often a disposition to distrust the professional witness, especially the paid expert. Dr. Henry F. Cambell, in his address as president of the American Medical Association, 1885, relates an incident in the experience of a medical witness where this was exemplified, and where scientific investigation was ridiculed, as follows: "A woman was on trial for the murder of her husband by poisoning with arsenic, and a learned professor of chemistry and pharmacy in a medical college was the expert, who confirmed the other witnesses by finding arsenic in the stomach of the dead man. The defendant's attorney, an able lawyer, asked him a few questions, on cross-examination, all leading to this: 'Had he, as an analytical chemist, ever failed to find arsenic for the courts in suspected cases?' To which the doctor answered that it had so happened that his analysis had always established the fact of arsenic in cases where its existence had been circumstantially made out. In his argument to the jury the medical expert was alluded to as the arsenic-hunter

for his college, and a good one, too, since he always found it—that the credit of his college would suffer if he failed to find it, etc. The woman was not convicted." An analogous case occurred in this State a few years since, and was related to me by a friend of the legal profession, who was thoroughly conversant with the facts: "A man was on trial for murder by poisoning with strychnia. He was seen to give the deceased, a half-witted creature, a drink into which he had just put a white substance from a bottle. Almost immediately he was attacked with convulsions, and soon died with all the symptoms of strychnia-poisoning. Prof. Redd, at that time by law the expert for analyzing suspected poisons, testified that he had found strychnia in the stomach of the boy, and showed in court the salts of strychnia in a vial, which he testified to having reduced from the contents of the stomach. The jury rendered a verdict of not guilty, and the most intelligent man on the jury told his fellows that, 'when that chemist said he got that salt out of the dead man's belly he believed he swore to a lie.'"

We here see how the results of scientific investigations are treated in our courts. I regret to say that the treatment received by the physician on the witness-stand is often caused, either by himself or his professional brother. If the doctor shows himself a partizan, if he uses his professional knowledge and position for selfish ends, or if he testifies simply because he was paid to give evidence that way, he cannot expect to command the respect due an honorable profession. The members of our profession, too, so often show such culpable ignorance on the stand! The mistakes, the ignorance, the fanaticism, the bombast, etc., of one of the profession reflects, to a certain extent, on the whole. It is the duty of every physician going upon the stand to so prepare himself, and show such perfect knowledge of the subject under consideration as to command the respect of all parties. Much often hangs upon the expert testimony. The life of a fellow-being is in jeopardy, the orphan's inheritance is hazarded, the innocent are to be shielded from the oppressor, the guilty are to be punished for crimes, or the freedom of the party is involved. To labor against the popular prejudices of the day, to combat the errors and stem the tide of fanaticism, or to assail perverted opinion, is no easy task; but when duty calls and truth demands it, when our labors and investigations as scientists show us where the right and justice lie, there is no neutral ground

for us, nor should we hesitate at the clamors of those around us, but as true physicians hold the scales of scientific inquiry with an even hand, and show our labors to be impartial, let it strike where it will. By a straight-forward, honest course of this kind, we can do much to remove the blame that is now attached to experts.

One of the principal reasons of the distrust shown experts is that the legal man has not kept pace with his medical brother in the advances made in knowledge. Law is a science of dry facts, founded on precedent, and does not claim to be progressive. A question presents itself here as to how much responsibility rests on the courts for much of the poor medical testimony given. Under our laws any man writing himself M.D. after his name is entitled to the appellation of *expert* on any medical question, subject only to the discretion of the presiding judge, who is poorly qualified to pass on a question of which he knows almost nothing himself. Though the matter under consideration may be connected with some specialty, in the knowledge of which he is very deficient, he is called, and in many cases even forced, to testify.

Dr. Thomas J. Turner, Medical Director U. S. N., recently read a paper on medical evidence before the American Academy of Medicine in New York City, from a resumé of which I make the following extracts:

"The boundary line where ordinary testimony ends and expert testimony begins, is not always well defined. * * * "As regard opinions on medical questions, anyone at present may be permitted to testify, the question as to the special amount of knowledge being left to the jury to determine. It follows from this theory that there is no evidence which varies so immensely as so-called expert evidence. It has been decided that a medical opinion may be received as evidence, if it is based upon study without practice, or upon practice without study, and it has been ruled that it is not absolutely necessary that one should have studied or practiced medicine. * * * The test of the admissibility of opinion-evidence (which term Dr. T. prefers to expert testimony) seemed to the writer to be this: Has the expert witness any peculiar knowledge or experience upon the subject matter under inquiry of value to the court in determining the truth of the matters at issue? The degree of credence given to opinion-evidence should be founded upon the professional skill, the quickness of perception, the powers of discernment, the aptitude, the acquirements and

the education, as well as the experience and observation of the expert in the matters upon which his special expert knowledge arises."

Consider how many departments of the science of medicine are tasked for the purpose of elucidating questions before the courts. The chemist, with his crucible, reagents, tests, microscope, etc., the anatomist, the pathologist, surgeon, obstetrician, each department itself a specialty requiring all a man's time and talents for years to master—all these and many others have been and will be again needed to furnish knowledge in its special line for the use of the courts in arriving at the truth of matters before them. And yet our courts accept the testimony, and even demand it, of the young physician in any or all of these departments, though the ink on his diploma is hardly dry, or from the physician who has shown no aptitude or paid no particular attention to the specialty on which expert knowledge is desired. Before the courts the ignoramus, with his purchased diploma, the egotist, anxious to show himself or parade his learning, the miscreant, prostituting scientific knowledge by offering it to the highest bidder, and the painstaking, laborious searcher after truth, with his various accomplishments and years of study, are all classed alike as experts. Is it any wonder that the physician's testimony does not receive that credence which is due it?

Let our courts insist on having as experts those who are competent, by education, experience and observation to testify on the subject under inquiry, and better testimony, more reliable in every way, will be obtained, and the odium of the present state of medical testimony will be removed. Dr. H. C. Wood says he has "never personally known a serious divergence of opinion in medical jurisprudence which did not grow out of the ignorance or incompetency of one of the two sets of experts.

By insisting on the above rule, the humiliating spectacle of scientific men professing to gain their knowledge from the same course, swearing to different results, as is sometimes now seen in our courts, will be avoided.

An examination of the Supreme Court decisions of our State on the subject will show the principles governing expert testimony, some few of the more prominent ones of which I propose to discuss. Throughout the decisions we find the scientific attainments of the physician recognized, and while these decisions have not kept pace in all respects with the rapid strides made in medical progress, they show an appreciation of our labors far in advance of decisions in other States and countries.

As regards the *fees* of experts, Section 3,756 of the Code, last clause, reads as follows: "That experts, when compelled to attend and testify, shall be allowed such compensation and mileage as the court may, in its discretion, order." There is one Supreme Court decision on this question in which it is held that "one summoned as an expert in a criminal action is entitled to an extra compensation under the act of 1870–'71, chapter 139, section 133." (Code as above.) The fees being often quite a *desideratum*, especially when put to much expense in attending court. most writers on jurisprudence advise that this matter be arranged before going on the stand. So far as my experience goes the judges of this State are not parsimonious in allowing fees.

The physician's attainments are recognized in diseases other than the human family, one decision holding that his testimony is admissible in diseases of animals, "when he swears that he is enabled to form an opinion from his reading, observation, etc., of the disease in question, though he has not made diseases of stock a special study." How far the analogy between diseases of man and the lower animals extends, or how great the similarity, I will not stop to discuss. Under the above quoted decision it is left with the witness as to his willingness to swear to the diagnosis, and of his competency and the degree of credibility to be given his testimony, under any circumstances, is a question for the jury. In State vs. Clark, Chief Justice Ruffin rendering the decision, says that "the effect of the evidence is, of course, to be decided by the jury." In the same decision the following language is used in regard to expert testimony: "Authorities need not be adduced to show that it is an established rule in the law of evidence that, in matters of art and science, the opinions of experts are evidence touching questions in that particular art or science. The rule is founded in necessity, because persons of ordinary avocations, including jurors and judges, are not generally capable of judging correctly upon many questions which must be determined in order to guide the decision of a legal controversy, and which depend on scientific knowledge or skill in art. * * * At all events, when professors of the science swear they can thus distinguish, it would be taking too much on themselves for persons who, like judges, are not adepts, to say the witness cannot thus distinguish, and on that ground refuse to hear his opinion at all. By such a course the judge would undertake, of his own sufficiency, to determine how far a particular science not possessed

by him can carry human knowledge, and to determine it in opposition to professors of that science. That course would subvert the principle on which the rule of evidence is founded, and exclude the evidence in all cases, since in truth its utility depends on having the aid of men of science at that point at which it is necessary to supply the deficiency in the knowledge of those who are not experts."

Before pursuing the subject further, it might be well to define what the law means by an expert, and for this purpose I copy from Chief Justice Smith in Flynt vs. Bodenhamer: "An expert is defined by Worcester, following Burrill, as 'a person having skill, experience or peculiar knowledge on certain subjects or in certain professions'; and by Bouvier as 'one instructed by experience.' The court must decide whether the witness has had the necessary experience to enable him to testify as an expert. But the value of his opinion when, admissible, must be determined by the jury alone, and depends upon the opportunities he has had for acquiring skill and knowledge, and the use he has made of those opportunities. * * * But the opinion of a well instructed and experienced medical man upon a matter within the scope of his profession and based on personal knowledge, is, and ought to be, carefully considered and weighed by the jury in rendering their verdict."

In the syllabus of this case it is held that a physician of thirty years practice is an expert. The first impression received here is that this is true. Certainly thirty years study and observation of any subject should qualify a man to speak with authority on matters connected with such subject. Yet the principal element or factor in forming the expert is lost sight of. Thirty years in the practice of medicine does not, and will not of itself, make an expert in insanity trials. From the very nature of the case it is possible to reduce his qualifications to a term of years. His opportunities for observation, aptitude for learning, powers of discernment, etc., must all be considered in summing up what it takes to make an expert.

Hearsay evidence is not admissible under any circumstances, and opinions based on the truthfulness of another witness' testimony is not allowed as expert evidence. The opinions must be founded either upon facts within the personal knowledge or observation of the report, or upon the supposition or hypothesis that the jury will accept the testimony of witnesses as to facts as true.

It is this principle of law that requires the use of hypothetical

questions. As much as this form of examination is abused, and as many objections as there are to it, it must still be used for the want of something better. Chief Justice Smith, commenting on expert evidence, says: "The opinion of those who are skilled in any department of art or science resting upon undisputed facts and within the scope of their special calling, are not only competent to be heard by the jury, but often greatly assist in the formation of a correct judgment upon matters they are called on to investigate. The superior knowledge of the expert is frequently required in the conduct of judicial examination of subjects beyond the reach of common observation. But this evidence has its restrictions, and must never be allowed to invade the rightful and exclusive province of the jury in drawing their own conclusions from the testimony, of the credibility of which they alone must judge. It is their duty to hear and pass upon the evidence, and the expert's opinion is admitted only to aid in performing that duty." In this connection the rule for the examination of experts as to the proper form is laid down, and is hypothetical, before alluded to, the general form of which is as follows: If the jury find certain facts deposed to by witnesses to be true, what is the expert's opinion of those facts? Many decisions sustaining this form of examination from other States are cited and approved.

In the department of psychology the law is farther behind medicine than in perhaps any other specialty of the profession. It has long been considered a difficult, if not almost impossible, matter to harmonize the two professions on the subject of insanity. Ordinarily the opinion of the physician on subjects connected with his profession is accepted by the courts, but on the subject of insanity acknowledged as one of the most difficult branches of medicine, requiring for its study a high order of intelligence and intellect and long years of close application, anyone is allowed to testify, and the opinion is accepted, though the witness may have never seen a case of insanity.

In insanity trials our courts have certainly made haste slowly. No one deprecates the wrong done to law and order, to society and to our own profession by the "insanity dodge" more than I. That it has worked injury in some States cannot be denied, and I would not advocate the plea to the extent that it is carried by some psychologists.

The great difficulty is how to define insanity. The law attempts to make a cast-iron rule and require every case to fit it. Precedent has more weight than the facts in the case, and if the facts do not tally

with the musty decisions of by-gone days, they are not recognized as carrying any weight. The jurist and the physician look at the matter from two stand-points almost diametrically opposed to each other. Medicine is a progressive science, broad and catholic in its base. The law does not claim to be progressive, but is largely made up of precedents.

On this subject, Mr. Justice Doe, of New Hampshire, says: "When the authorities of the common law began to deal with the subject of insanity, they adopted the prevailing medical theories. * * * Without and conscious or material partition between law and fact, without a plain demarcation between a circumscribed province of the court and an independent province of the jury, the judges gave to juries on questions of insanity the best opinions which the times afforded. In this manner opinions purely medical and pathological in character, relating entirely to questions of fact, and full of error as medical experts now testify, passed into books of law and acquired the force of judicial decisions. Defective medical theories usurped the position of common law principles. The usurpation, when detected, should cease. The manifest imposture of an extinct medical theory, pretending to be legal authority, cannot appeal for support to our reason, or even to our sympathy."

Legal insanity in this State, in a charge by a superior court judge (Green), and endorsed and commended to the other judges by the Supreme Court, is thus defined: "That if the prisoner, at the time he committed the homicide, was in a state to comprehend his relations to other persons, the nature of the act and its criminal character, or, in other words, if he was conscious of doing wrong at the time he committed the homicide, he is respodsible. But if, on the contrary, the prisoner was under the visitation of God, and could not distinguish between good and evil, and did not know what he did, he is not guilty of any offence against the law, for guilt arises from the mind and wicked will." Following precedent and the established order of things for generation after generation, because, perhaps, this way was good enough for our great-grandfathers, it must be all right for us, our courts thus cling to the knowledge test for responsibility, after it has been shown, time and again, to be erroneous, by the advances of psychological medicines. This test has been variously modified according to the views of the different judges rendering decisions on the question, since the '*wild*

beast' test of Mr. Justice Tracy, in 1723, while still holding to the cast-iron rule of knowledge as the criterion of responsibility. It was affirmed in 1843 by the English judges, in answer to questions by the House of Lords, in these words: "* * * That before a plea of insanity should be allowed, undoubted evidence ought to be adduced that the accused was of *diseased mind*, and that at the time he committed the act he was not conscious of right or wrong." In 1868 Judge Brewster held that the true test was in the word power; had the accused the power of distinguishing between right and wrong, and the power to adhere to the right and avoid the wrong? Lord Brougham says if he knew what he was doing was contrary to law, that should be the test of his sanity, and Lord Lyndhurst uses these words: "The question was, did he know it was an offence against God and nature?" Chief Justice Tracy restricted the test to the particular act in question, and Parke modified it by the knowledge and character of the deed, and knowledge of doing wrong in so acting, and the whole position is condemned by Justice Ladd.

A short extract from Justice Doe's opinion in the case of State vs. Pike, already quoted from, is applicable here: "It is common practice for experts, under the oath of a witness, to inform the jury, in substance, that knowledge is not the test, and for the judge, not under the oath of a witness, that knowledge is the test. And the situation is still more impressive when the judge is forced, by an impulse of humanity, as he often is, to substantially advise the jury to acquit the accused on the testimony of the experts, in violation of the test asserted by himself. * * * If tests of insanity are matters of fact, the judge should no longer testify without being sworn as a witness and showing himself qualified as an expert."

The jurist is disposed to look at this subject in a stern, matter of fact way, hard in all its bearings, regardless of human infirmities and frailties, while the physician is lenient, recognizing "the ills that flesh is heir to," and merciful to an unfortunate fellow-creature. It is charged against him that it is this feeling of tenderness and forbearance that prompts him to expose the cause of this class before the courts, but the loyal physician, ever faithful to the trust imposed upon him, will always follow the way of truth and justice, and it is justice for the insane, when scientific knowledge or inves-

tigations show him the truth of the insanity, that leads him to advocate his cause. The jurist is confessedly out of his domain in treating of the subject. He may be well suited to cope with the callous, hardened criminal, but what can he be expected to know of the delicate mechanism of the human brain or the influence of disease upon its physiological action? As physicians, we are willing to grant him all the authority or power desired in his own profession, but it is time to resent his interference in matters belonging exclusively to the medical profession. Time was, when the insane was considered as being possessed with a devil, that there was perhaps an excuse for bringing the acute faculties of his mind to bear on a question confessedly difficult to solve, but in the enlightenment of the nineteenth century, when insanity is universally recognized as a *disease*, there is no excuse for his interference, unless he will consent to keep pace with the anvances in psychology in his decisions. Another quotation from Judge Doe shows that the fact is recognized by the judges, too: "The legal profession, in profound ignorance of mental disease, has assailed the superintendents of insane asylums, who knew all that was known on the subject, and to whom the world owes an incalculable debt, as visionary theorists and sentimental philosophers, attempting to overturn settled principles of law, when, as in fact, the legal profession was invading the province of medicine and attempting to instill old, exploded theories in the place of facts established in the progress of scientific knowledge. The invading party will escape from a false position, when it withdraws into its own territory, and the administration of justice will avoid discredit when the controversy is thus brought to an end."

This state of affairs is somewhat condoned in one Supreme Court decision in this State, where the judge uses the following language in rendering his decision: "This test (the knowledge of right and wrong) has long been resorted to as a general criterion for deciding upon legal accountability, and, with a restricted application to the act then about to be committed, is approved by the highest authorities. But we do not attempt to lay down any rule of universal application. It seems chimerical to attempt to do so, from the very nature of things, for insanity is a disease, and, as is the case with all other diseases, the fact of its existence is not established by a single symptom, but by a body of symptoms, no particular one of which is present in every case.

Imperfect as the rule may be, it covers a great variety of cases, and may aid the tribunals of the country in judging of this most difficult subject."

Dr. Charles E. Johnson, in writing of this test, asks: "Who is to be the judge of what is right and what is wrong?" All men's judgments are not the same on this or any other question. What the judge, with his learning, would denounce as an iniquity, the jury, perhaps less informed, might view very leniently as a mere peccadillo, and the prisoner in the box, with none of the advantages of education, usages of polite society or Christian influences, would look upon as no wrong at all.

Physicians who have given any consideration to the matter, know that this test is impracticable; that the symptoms by which insanity is recognized are as variable almost as the number of cases. To claim that because a man has a knowledge of right and wrong he is sane in all cases, is erroneous, or even that because he has the power to resist the wrong and keep to the right, he is sane, is not true. It is within the province of the law to say that this shall be a test of responsibility, *perhaps*, but when the question of insanity arises, the jurist, knowing nothing of the disease, should leave it to the physician to diagnose. If insanity is to be the test of responsibility, then the knowledge of right and wrong as a criterion is an error bequeathed to us as another instance of "that jealous affection and filial reverence, which have converted our (legal) code into a species of museum of antiquities and legal curiosities," along with the right of trial by evager of law or by ordeal. Dr. C. H. Hughes, in an editorial ("The Judicial Psychology of the Guiteau Trial"), writes thus of the subject: "And even when the learned judiciary, whose province it is to *interpret* rather than *make* pathological laws, as it is likewise his province to determine what municipal laws *are*, and not to *make* them, forms a judicial psychology not sustained in the laws of morbid mental movement, sound psychiatry may be thereby set back a quarter of a century or so before courts; but the truths of psychiatry remain the same as though no judicial fiat had sought to make them what they are not, and they will ultimately appear uppermost, despite judicial decision that they are what they are not.

"To ignore motives and resistless impulses of mind deranged, does not, and will not, obliterate them as facts from the phenomena of mental disease."

I cannot better close this special feature of the question than by quoting from one of the legal profession, who, in speaking of the medical and legal professions, says this of the jurist: "He contributes little or nothing to the stock of human knowledge. He has given himself to the study and application of a science—if indeed it be a science—which as often deals with artificial principles and dogmas as with great abiding truths. In grasping at the philosophy of jurisprudence he is fettered, even in this day and generation, by precedents of scholastic absurdity, which date back before the Wars of the Roses, and by statutes, the very records of which were lost before the Reformation. The scientific aim and effort of his professional life is to show that 'thus it is written.' The legacy which he is able to leave behind him to society is therefore rarely better, in its best estate, than a tradition of high faculties fearlessly and honestly dedicated to justice and duty."

This decision, or rather test, of accountability in alleged insanity before the courts, is probably founded on the belief that the will of man is preëminent, controls all mental faculties, and acts independently of them. Volition is not an abstract quality of the mind, with a definite nervous centre, but is dependent for its action on many contingencies in connection with the other functions of the brain. Volition can be exercised only after deliberation, which we generally call reason or the reasoning powers of the individual; this is but the recognition of certain ideas or experiences of a painful or pleasant character consciously recalled by an act of memory. Thus to produce the best results as to man's power of exercising his will there must be complete harmony of action with all the brain functions, and he who best harmonizes these functions by judicious exercise, will approach the nearest to perfect power over those ganglionic cells which are the *associated* centers of ideas which control that faculty called volition."

Should there be such a state as to impair the utility of these cells in the brain there will be a want of harmony in the performance of function, the connecting links will be severed, and the action resulting will not be the same as in a healthy organism. Indeed, we see daily the effects of such action in that we have better control of our feelings, desires, etc., at one time than another. How often do we find our whole mental faculties given over to the consideration of some subject most probably faithful, in spite of any will

power we may exert, keeping us awake through the long hours of the night, and forcing itself into our dreams should we doze. And yet the man whose brain is diseased, whose thoughts are consequently morbid, in whom this healthy power of the will is lost by reason of inharmonious action, this man, who has lost all control of himself by reason of disease, is expected by the stern edict of the jurist to exert more will power, and put away an unpleasant thought or refrain from an action, than the man in full possession of his powers of mind.

Every alienist can recall numbers of cases where the insanity was beyond doubt, still having a knowledge of right and wrong, but where irresponsibility was evident. No cast-iron rule to fit all cases can be made, nor can any single test be applied that will be just and equitable. The question in cases of alleged insanity should be, Was the action the result of a brain diseased in such a manner as to interfere with function? Or, as it has been stated, How has *disease* distorted the normal relationship of the man to the crime and surroundings"?

Time and again has this question been discussed in all its bearings, from both legal and medical points of view, with always a like result—each claiming the victory in the contest, and each pursuing the same course as before: the jurist still clinging to his cast-iron rule, and the physician holding to the faith he has in scientific studies and psychological medicine.

Another principle in the execution of our laws in relation to insanity to which I would take exception, is found in the Supreme Court decision requiring that "Hereditary insanity can only be shown where it is of the same kind as the prisoner's."

Chief Justice Pearson, in rendering this decision, speaks thus of hereditary insanity: "It is a lamentable fact, admitted by everyone, that such maladies are hereditary; and it would seem that the proof of the fact, that members of the family so related as to have the same blood, are, or have been, afflicted with a like malady, is admissible as a circumstance, when aided by other circumstances, and would go to show the insanity of the prisoner, although, of course, evidence of such hereditary taint in the blood, would only be one link in the chain, and would not *per se* establish the fact; but the question as to the policy or expediency of admitting such evidence in legal investigations, presents many and very great

difficulties; it is wrong to exclude what may lead to truth, and yet such evidence would in numberless cases lead to falsehood, and screen the guilty in defiance of truth. On the other hand, we find it in some degree an open question in the legal authorities. Thus far the way seems to be clear: in order to render it admissible the species of insanity alleged, and that offered to be proved in respect to members of the family, must be of the same character; and the instances to be proven must have been notorious, so as to be capable of being established by general reputation, and not left to depend upon particular facts and proofs, but about which witnesses may differ, and the consequence of which would be to run off into numberless and endless collateral issues; so that in trying the question of the insanity of one, the supposed insanity of a half dozen would be drawn in."

If I understand the decision, it means that a case of mania produces mania in the offspring, should the insanity be transmitted. In other words, it does not recognize a transformation of type in the inheritance of this malady.

This decision is, I judge, founded upon the acknowledged difficulties in the way of admitting testimony as to heredity, following, perhaps, the Scotch law partially, which does not admit testimony of this character. That injustice would often be done by following this entirely, a compromise is effected by conforming to Esquirol, one of the first systematic writers on the subject of insanity, who wrote over a half century since. He says: "Hereditary mania manifests itself among the patients and children often at the same period of life. It is provoked by the same causes and assumes the same character." Granting that Esquirol was right, it is by no means proven that this is the rule, for in fact it might be said to be an exception, for alienists of the present day, after longer study and more experience, differ from him on this point.

An inherited tendency to insanity is dependent on so many contingencies for its development, that it is impossible to tell what form it will assume, even if insanity should supervene. By surrounding the person with the necessary safeguards in the way of mental hygiene, avoidance of troubles, excitement, etc., the tendency may not culminate in an outbreak of insanity at all. The character or form of the insanity is influenced, in a large measure, by the exciting cause, whatever, it may be. It may be the death of

a friend, a reverse of fortune, the excitement of politics, religious fervor, or many other occurrences in daily life.

Spitzka alludes to the frequent intensification of the malady in the progeny, and this can be verified in almost any neighborhood, certainly in any county, can be found families degenerating as to the various nervous affections. This degeneration and intensification of the transmitted neurotic diseases is admitted by most of the writers of the present day. But we go even farther than this, and assert the transformation of type in the progeny. Owing to the difficulty in obtaining the history of cases of hereditary insanity, I have not prepared any statistics on the subject. My own observations coincide with the views quoted here.

Stearns says: "It is not the case, however, that definite forms of insanity always repeat themselves, but, on the contrary, change, so that a case of mania may appear in the second generation as a case of melancholia or acute dementia, and *vice versa*, melancholia may appear as dementia. * * * It is not necessary that the tendency towards unstable mental action should be fully developed in the parent, in order that it may so appear in the child. * * * Great singularity of conduct habitually displayed, periods of depression, irritableness and nervousness, when crossed with similar characteristics in the other parent, or other unusual ones, not infrequently develop into actual insanity in succeeding generations."

Hereditary action is held by Maudsley "to be rather of the nature of a complex chemical combination whereby compounds, not resembling in properties their constituents, are oftentimes produced, and not of the nature of a more mechanical copy." Again, he says: "Anyone who will may make the observation that when two persons of narrow and intense temperament, having great self-feeling and distrustful of others, and prone themselves to cunning ways and hypocritical dealings, mean in spirits as in habits, perhaps deceiving themselves all the while by an intense affectation of religious zeal, of evangelical, ritualistic or other extreme type, unite in marriage and have children, they lay the foundations of insanity in offspring more surely often than an actually insane parent does."

Griesinger says on the subject of heredity: "At present we can claim for tuberculosis alone an influence of hereditary circumstances in some degree equal to that exhibited by mental diseases." "Sometimes hereditary mental disorders present essentially the same charac-

ters in parents and children, and occasionally also in a whole line of brothers and sisters, appearing at the same age and terminating in the same manner, as, for example, suicide. Frequently, however, this is not the case; the psychical disorder manifests itself in different ways, partly dependent on external circumstances."

Bucknell and Tuke, in their work on "Psychological Medicine," say: "But while the same form or type of mental disorder may descend from one generation to another, it is also certain that not only may one form be succeeded by one of a very different character, but by other neuroses, as epilepsy or chorea. * * * Gaussail held that nothing is transmitted but the aptitude for some form or other of nervous disorder, and that this is wholly determined by causes subsequent to birth. Lucas shows that, as in an individual any nervous affection may be transformed into another, and thus prove the consanguinity of those disorders, so may the like transformation take place in parents and children."

In writing of heredity as a cause of insanity Dr. Mann says: "Insanity also may appear in the same form in succeeding generations, or it may assume an entirely different form, or even assume another form of nervous disease. Thus, it is common to see cases in which the patient, suffering from mania, the offspring may develop symptoms of epilepsy or chorea."

Chief Justice Gibson, of Pennsylvania, in admitting evidence tending to show hereditary transmission of insanity, reviews the dicta of Chitty and Shelford as to its being an established rule of law that such evidence shall not be admitted, and says the only case where it was brought up the question was avowedly dodged, and the decision arrived at on another point of law, and says the authority of a question appealed from and left *in dubio* cannot be very great." "What if the point had been ruled by the chancellor and law judges in the House of Lords? Professedly learned in the maxims of the law, they were profoundly ignorant of the lights of physiology; yet free from the presumptuousness of which ignorance is the foster-father, they refused to rush on the decision of a question to which they felt themselves incompetent."

That the question of the admission of testimony bearing on heredity presents many difficulties is evident; it is also evident that in the light of the better knowledge of the present day, and the teachings of psychologists, that the decision now under discussion

should be modified. If testimony as to heredity is to be admitted at all, let it be in accordance with the whole truth, and not by suppressing the part which may be of most use to the prisoner on trial. Many more references as to the transformation of the type, or, as the Supreme Court decision has it, "species or character" of insanity inherited from the parent, might be given, but these are deemed sufficient, especially as we can verify the position taken within our own experiences.

Non-expert testimony is allowed in insanity trials; that is, persons not physicians are allowed to testify, giving an opinion as to the sanity or insanity of the individual, but with this difference: while the expert bases his opinion on the testimony of others, and not necessarily from observation exclusively, the non-expert can give his opinion only upon his personal observation. Judge Gaston, in rendering a decision on this question, uses the following language: "But judgment founded on actual observation of the capacity, disposition, temper, peculiarities of habit, form, features or hand writing of others, is more than mere opinion. It approaches knowledge, and *is knowledge*, so far as the imperfection of human nature will permit knowledge of these things to be acquired, and the result thus acquired should be communicated to the jury, because they have not had the opportunities of personal observation, and because they can in no other way have the observation of others."

I have already discussed the subject of what an expert is, but wish to add a few lines here. In investigations before the courts, many matters other than medical questions, demand testimony of a peculiar character from persons so situated by profession, study or observation, as to be enabled to come nearer the truth than others not enjoying the same advantages. A rickety bridge over a stream on the public road, may be pronounced unsafe by the whole neighborhood, because it has gone so far in its decay as to be evidently so to all. An immense iron structure spanning a river may seem the very embodiment of strength and durability to the general observer, yet pronounced unsafe by the engineer. Because the general observer was competent to judge of the condition of the first bridge, would or should his opinion be taken against the experts in a court of law as touching the second? A severe wound may be recognized as dangerous by any observer, while a stab, with little or no bleeding, may not seem dangerous; whose evidence

is better than the surgeon's on this point? The insanity of the raving maniac is recognized immediately by all with whom he comes in contact, but who is to judge of the phases of insanity where the outward show is slight?

Under a decision already quoted, and I believe under the common law, the question of insanity is a question of fact for the jury. In other words, the jury is to judge of the insanity of the prisoner at the bar from the evidence presented. Even though they may have never seen a case of insanity, have never studied the subject, or even read a line in regard to insanity, it is their duty to pass judgment upon a matter that has taxed the brain and consumed the time of giants in intellect, without arriving at a satisfactory conclusion. For assistance they have as witnesses men on a par with themselves as to real knowledge of the subject—the attorney, who has gained his knowledge of a *medical* question from a *legal* text-book, and the judge, who delivers a charge on what is insanity, with the musty decisions of by-gone days as his guides. Is it any wonder that the insane man is often convicted, or that the culprit often escapes punishment on the plea of insanity under such a state of affairs?

While non-expert testimony is competent and is often used in insanity trials, it is held that the testimony of the physician in regard to the mental state of a person is of more importance than that of a non-professional witness, and the following charge was delivered to the jury: "* * * That it was the business of a physician to understand the disease of the mind as well as of the body, and that his opinion for that reason was entitled to higher consideration than ordinary witnesses." The Supreme Court, in reviewing this charge, uses the following language: "It may be said of the physician that he is, by the nature of his studies and pursuits, particularly skilled in the mental as well as in the physical diseases of men, and with respect to the parties upon whom he is in constant attendance, he must be supposed, as well from his superior knowledge, as from his better opportunities of observation, to be particularly well-informed as to their state of mind. What, therefore, the judge thought proper to say upon the subject of the witnesses mentioned, we do not think liable to any just exceptions."

Did time permit, there are other decisions on matters relating to

insanity that might be profitably reviewed, but as I fear I have trespassed already too long, I will here simply refer to them, and may perhaps enlarge on them in the future. The subjects of moral insanity and moral debasement are treated of in the cases of Mayo vs. Jones, 78 N. C. R., 402, and State vs. Brandon, 8th Jones, 463, neither of which is recognized. A subject of much interest, and one which should be thoroughly studied by the expert on insanity, is what evidence can be introduced as to insanity, or to show insanity. We have Supreme Court decisions on it in the famous Johnson will case, Wood vs. Sawyer, Philips' Reports, 251; State vs. Cunningham, 72 N. C. R., 469; Barker vs. Pope, 91, N. C. R., 164.

I have tried to show some of the objections to the existing state of facts as regards the law and the doctor, and wish that I might suggest a remedy that would be accepted. Our hands are, in a measure, tied. We can point out these errors, and give our reasons for the necessity of a change, but as the courts have *all* the authority, we can do nothing more than urge the truth and justice of our position. Dr. W. C. McDuffie recognizes this evil in a recent article, and suggests that the decision of the whole matter, so far as the insanity is concerned, should be left to the doctor.

Dr. Buckham, in his little work, urges that the superintendents and first assistant physicians of our asylums of a —— number of years experience should have as part of their official duties the giving of testimony on insanity whenever required by proper authority, and without compensation. He makes several suggestions in the way of safeguards to be thrown around such experts. To have a commission composed of doctors alone, or perhaps doctors and lawyers, to judge of these cases, or to leave it entirely to an expert, *and the court be governed by such decision*, is open to objections, for we are met on the very threshold with a constitutional enactment granting to every citizen that great bulwark of liberty, the right of trial by jury. All reforms, to be permanent, should be gradual, and there is much need of care in dealing with this subject. Let us as physicians go forward fearlessly, honestly and conscientiously doing our whole duty—more we cannot do.

Authorities Quoted in the Foregoing Article.—Journal of American Medical Association, Vol. 4, No. 18, May 2, 1885; Journal of the American Medical Association, Vol. 5, No. 20, Nov. 14, 1885; The Polyclinic (Philadelphia), Vol. 2, No. 7, p. 105; State vs. Dollar, 66 N. C. R., 626; Horton vs.

Green, 64 N. C. R., 64; State vs. Clark, 12 Iredell, N. C. R., 151; State vs. Clark, as above; Flynt vs. Bodenhamer, 80 N. C. R., 205; Barker vs. Pope, 91 N. C. R., 165, and State vs. Bowman, 78 N. C. R., 509; Clairy vs. Clairy, 2 Iredell, N. C. R., 78; State vs. Pike, 49 N. H. R., 399, also American Reports, Vol. 6, p. 533. From Dissenting Opinion of Judge Doe, 579; State vs. Haywood, Philips, 376. ("It is not every kind of frantic humor or something unaccountable in a man's actions that points him out to be such a man as is exempted from punishment; it must be a man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a brute or wild beast; such a one is never the object of punishment.")—*Maudley's Responsibility, p.* 90. Wharton and Stillee Medical Jurisprudence, Sec. 159; Buckham's Insanity in its Medico-Legal Relations—Appendix, p. 221, where the different opinions of judges are given in groups; American Reports, Vol. 6, 584; American Reports, Vol. 6, 581; State vs. Brandon, 8th Jones, N. C. R., 468; Insanity in its Medico-Legal Relations, 133; Insanity in its Medico-Legal Relations, 181; Alienist and Neurologist, Vol. 4, No. 1 (Jan., 1883), 141; Insanity in its Medico-Legal Relations, 242; Maudsley's Physiology of Mind, Chap. on Volition; Alienist and Neurologist, Vol. 4, No. 1 (Jan., 1883), 143; State vs. Christmas, 6 Jones, N. C. R., 471; Esquirol's Treatise on Insanity (1845), 49; Insanity. Its Classification, Diagnosis and Treatment, by E. C. Spitzka, 86 (edition of 1883); Insanity: Its Cause and Prevention, by Henry Putnam Stearns, 129; Maudsley's Pathology of Mind, 92; Maudsley's Pathology of Mind, 95; Mental Pathology and Therapeutics, by Grissenger (Wm. Wood & Co's edition, 1882), 106–109; Psychological Medicine, by Bucknell and Tuke, 63–64; Psychological Medicine and Allied Nervous Disorders, by E. C. Mann, 55; Clary vs. Clary, 2 Iredell, N. C. R., 78–83; Cornelius vs. Cornelius, 7 Jones, 593; North Carolina Medical Journal, October, 1885; Insanity in its Medico-Legal Relations, by T. R. Buckham, 172.

NOTE.—I wish to acknowledge my indebtedness to Hon. Walter Clark, Judge Fourth District, for valuable aid rendered in the preparation of this paper, and to the members of the Goldsborough bar for the use of books from their libraries, and for other favors shown. J. D. ROBERTS.

Page 6—12th line from top, leave out the word *himself*.
" 6—24th " " " " off quotation marks before word As.
" 7—29th " " " insert quotation mark after expert.
" 9—14th " " " leave out comma after when.
" 9—29th " " " read *impossible* for possible.
" 9—36th " " " read *expert* for report.
" 10—17th " " " read *expert* for report.
" 11—28th " " " insert *the* before hypothetical.
" 12— 4th " " read *responsible* for respodsible.
" 13—15th " bottom, read *espouse* for expose.
" 14—26th " top, read *advances* for anvances.
" 15— 2d " " read *wager* for evager, and strike out *of law*.
" 15—last line, read *painful* for faithful.
" 17—13th line from top, read *one* for onc.